IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RICHARD SEEBORG, CHIEF UNITED STATES DISTRICT JUDGE

Anibal Rodriguez, et al., individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
vs.	)	3:20-cv-04688-RS
Google LLC, et al.,	)	
Defendant.	)	

REPORTER'S TRANSCRIPT OF MOTIONS HEARING

THURSDAY, FEBRUARY 13, 2025

3:22 P.M.

SAN FRANCISCO, CALIFORNIA

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ALSO PRESENT:

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James Lee, Esquire, Boies Schiller Flexner
John Yanchunis, Esquire, Morgan & Morgan
Ryan Sila, Esquire, Susman Godfrey

P R O C E E D I N G S

(Court is called to order on Thursday, the 13th day of February 2025, at 3:22 p.m.)

THE COURTROOM DEPUTY: Calling Case 20-CV-4688, Rodriguez versus Google.

Counsel, please come forward and state your appearances.

MR. BOIES: Good afternoon. My name is David Boies of Boies, Schiller and Flexner on behalf of the plaintiffs.

THE COURT: Good afternoon.

MR. HUR: Good afternoon, Your Honor. Ben Hur, Eduardo Santacana, Argemia Florez, and Harris Mateen from Willkie, Farr, and Gallagher for Defendant Google.

THE COURT: Good afternoon.

MR. MAO: Good afternoon, Your Honor. Just special appearances: Marc Mao and James Lee with Boies Schiller Flexner; colleague John Yanchunis of Morgan and Morgan; also Ryan Sila with Susman Godfrey.

THE COURT: Good afternoon.

MR. MAO: Good afternoon.

THE COURT: We may need to -- to have somebody, as I understand it, from IT or IT department who may come and fiddle with the microphone; is that

right, Ms. Lew?

THE COURTROOM DEPUTY: Yes.

THE COURT: Yes. So don't --

THE COURTROOM DEPUTY: We could still talk, but --

THE COURT: Yeah. Don't -- I mean, it may be a little distracting, but just barely long, because we've got to get through this. So don't be surprised if somebody is fiddling with the microphones up here.

Okay. So this is Google's motion to strike the supplemental damage opinion of Mr. Lasinski. I've read through what you've given me. It's kind of a glorified Rule 26 disclosure issue. Don't see too many of those; usually, those refer to the magistrate judges. But this is a consequential issue, I understand.

So I don't have a tentative for you. Probably just want to get a sense from you about what's going on here. So why don't I go ahead and start with Moving Party, whoever wants to speak?

MR. SANTACANA: Thank you, Your Honor. Eduardo Santacana for Google.

So I think I'll -- I'll just quickly summarize our position, Your Honor, and see if you have questions for me.

This is a Rule 26 issue. We filed the motion

before there was a supplemental damages report. It was disclosed after the motion was filed. I don't take any issue with that, but just to be clear procedurally on where we're at.

It's a -- it is a Rule 26 motion to strike. And the plaintiff's position is that they're authorized by Rule 26 to have amended their damages computations, and then, ultimately, the calculation of actual damages that Mr. Lasinski makes because of the duty to supplement under Rule 26.

And the Ninth Circuit has looked at this at least three times in reported decisions and once in unreported decision in the last few years, and every time has come to the same conclusion, which is that that's not -- what -- what they've done there is not an appropriate use of Rule 26, which is a duty, not a right, to supplement your expert report --

THE COURT: Although I assume those cases are all -- are they-all saying that the judge's discretion at the trial level on the issue is the one that they're affirming?

MR. SANTACANA: That's exactly right. They're affirming under abuse of discretion a district judge's decision to exclude --

THE COURT: Right.

MR. SANTACANA: -- supplemental expert opinions.

THE COURT: So they're not necessarily saying -- they're saying that it's a (inaudible) that the district judge, the trial judge, is going to get to make, is what they're sort of saying, if you have a basis for the decision that you make. Didn't want to sort of jump ahead and --

MR. SANTACANA: Sure.

THE COURT: I believe in the rules. The rules are important. We need to respect them. At the same time, just so that I kind of have an understanding of what went on here, Mr. Lasinski, in his initial report, said he had a conservative floor, which I know you will take great issue with. But what he said at the time was -- he disclosed his methodology. Methodology said the -- his conservative floor was 486 million. And he -- he explained how he got there.

And you, in the deposition, pushed back on him and said, you know, "Why are you using this three-dollar figure on a one-time basis? Isn't -- it would make more sense, if we're applying your approach, to doing it on a monthly basis?"

And he said, "Well, I don't have enough information because Google hasn't turned over what I

would need to do that." Okay.

For the moment, I'm not getting into the battle of whether or not you should or shouldn't have turned over that material. He -- he's telling you exactly what his method is. He's saying, "This is my floor, and here we are."

Your motion to strike, if I understand it correctly, is to effectively say that, you know, they -- he can't go over four -- 486 million because that's the figure he -- you're locked in. That's your ceiling now. How do you get there?

MR. SANTACANA: So --

THE COURT: I don't get it.

MR. SANTACANA: I think there are two -- two misnomers in your summary of our motion that come, I think, from the way that the oppositional brief was argued. And I want to address that.

THE COURT: You blame them. That's right.

MR. SANTACANA: So I want to address both of those head on. So the first is, you said that I questioned Mr. Lasinski to say, "Wouldn't it make more sense to do it this way?" I'm not sure that's quite how I characterize what happened in the record.

What I said was in the deposition -- I mean, he was questioned for hours about lots of different

factors he could have taken into account, as you'll recall. Then we filed a *Daubert* that said, "Can you take account any -- anything, basically, other than three bucks per head?" So this is one of the factors that we questioned him on.

The reason was because he did use the months figure as a third variable in his calculation -- $3, number of devices, and number of months. He did it in the *Brown* case, and that had happened before the deposition. And so the obvious question was, "Why did you change your methodology for this case?" So not that I thought it would make more sense, I just wanted to understand his opinion. And he explained it.

And it was not -- the explanation was not that he was missing data. And I -- I want to be really clear about this. Because the opposition raises two different types of data that it argues are somehow relevant to this, and neither one of them is relevant at all. And this is how we know that.

First of all -- actually, there's two reasons we know that. One is, in the *Brown* case, he disclosed his intention to multiply by months in words, not in numbers. He could have done that in his report. He chose to do the opposite, which was to say, "I don't want to multiply by months. I want to do this one-time

fee." So he disavowed the same approach he took in the other case.

But the other way we know it is, because I questioned him about it, in the report, he had already calculated the number of months up through 2022. That number was already in there. He uses it for a completely different, unrelated opinion. And so that variable is out there.

And I say, "We have all these numbers in your report. Here's one that you already calculated and said, so you could, for example, calculate the number of sWAA off months for each user, right?"

He said, "I did do that, yes." So he's -- in his deposition, "I did that. I have the number already. I don't need any more data. I have the number."

And I said, "You did do that. So why didn't you pay them for sWAA months in your actual damages opinion?"

And his response was, "I mean, ultimately, I thought it was more appropriate and conservative to do a -- a one-time calculation with the same information I had available."

THE COURT: Yeah. But doesn't he say he didn't have sufficient information, i.e., from you?

MR. SANTACANA: He -- he uses a disclaimer,

Your Honor, that we use in every expert report in every case, which is: "If more information comes out later, I will reserve the right to supplement that."

He does also separately complain that we hadn't provided him certain types of information that don't bear on this question. So the number of months that users had sWAA turned off had been disclosed to them. And he calculated the number. And it's in his -- in his expert report -- I can point you to the paragraph in his expert report where he has the number sitting right there.

Now, when the plaintiffs supplement their initial disclosures a few months ago, in September, they rigged the number from his original expert report. And they multiplied by $3 and by the number of devices.

So the opinion I want to exclude is an opinion that takes numbers from one part of his report and multiplies in another part.

THE COURT: Well, but --

MR. SANTACANA: So they weren't missing anything.

THE COURT: -- in your -- your motion, I thought the -- the end result of what you want me to do is to lock them in at 486 -- 486 million is -- that's -- that's the ceiling of what they can seek in this

lawsuit.

MR. SANTACANA: Well, they had a second different -- another damages matter with a larger number than that.

THE COURT: All right.

MR. SANTACANA: But as for damages, what I'm asking is that they'll stick to the computation they disclosed during discovery.

THE COURT: But he -- he said at the time -- he said -- he -- he said it was his floor, right? You know, I understand why you think he's out to lunch and you're going to be able to go and, you know, hammer and (inaudible) against this guy. And I'm not saying he -- at this point that, you know, I buy his calculation.

But what's unusual about this motion to me is that ordinarily when this kind of issue percolates up to me, it's that, "Oh my God, the -- the -- the other side has changed their entire -- they've -- they've done a bait and switch on us. They pulled their -- their initial methodology. And they've got a whole new thing. And we're prejudiced because we built our case all the way along premised on this idea that we understood what they were seeking."

Here, their -- he hasn't changed anything. He's changed the -- the -- you knew all the factors he

was going to use. And now he's doing it per month with a particular period of time. How are you hurt by that? You knew all that before.

MR. SANTACANA: So that -- that -- now -- now you're asking about harm. But I want to be --

THE COURT: Well, I do want to ask about it.

MR. SANTACANA: Yeah.

THE COURT: So even though you may think I'm mixing things --

MR. SANTACANA: No, no.

THE COURT: Go with me.

MR. SANTACANA: I'll go with you.

THE COURT: So tell me why that's wrong.

MR. SANTACANA: Yeah. So what -- what I did, Your Honor, and what we did repeatedly at his deposition with two of our rebuttal expert reports, after *Daubert*, we said it's inexplicable that he chose not to multiply by months, given that he had done it in *Brown*, and that is evidence that his methodology is malleable. That was one of the attacks that we made. Your Honor opined on it at class cert at summary judgment.

We also relied on Mr. Lasinski and the plaintiffs closing themselves out of including months as a variable in the calculation. So it's an -- an equation that had two -- two inputs -- $3 dollars --

THE COURT: How is your --

MR. SANTACANA: -- number of --

THE COURT: How is -- all the work you've done on the case after the disclosure of the report, how are you now impacted in the -- in the sense that you -- you've been prejudiced in that you thought that this case was very -- going off on a very different angle, and you've structured your case, and you've done it all, and now, "Oh my God. We're so left in a terrible position because all this time was spent thinking the case was something that it isn't"? That -- that's not the case here.

I -- I -- you have a Rule 26 argument. And I'm not discounting it. And I'm not even saying that I'm not going to accept it. But it is a -- it is -- what I'm asking you is it seems to me to be more a technical violation of the rule than one that has actually really, negatively impacted you very much.

We've got months before trial. They've now upped the ante quite significantly in terms of the exposure. I understand that. But I -- I don't think you're going to tell me, "Well, you know, for all these months, we've been building a case. And now they've, you know -- people have -- we can't find people who can respond." I mean, it's -- it's just not one of those

cases. It's a technical, at best, Rule 26 violation.

MR. SANTACANA: So the reason that there is harm -- and I want to also remind you that under Rule 37, it's about harmlessness. The sanction under Rule 37 is automatic unless they can show harmlessness, not a lack of prejudice, which are different standards. And harm -- the harm here is the deposition we did of him was a waste of our time and money. They're asking us to depose him again, which costs time and money and have to reopen discovery. The rebuttal reports of two of our experts now need to be supplemented. No doubt they will want to depose them too.

The *Daubert* arguments that we made against him, we will have to make again. Now, we've had April 3 date for a *Daubert*. If you let this in, we intend *Daubert* it, but we have to do it all over again.

Your Honor ruled on a *Daubert* -- on an actual damages model that doesn't exist anymore. And -- and when you were ruling on it, we were arguing that a flaw in the model was that it was missing this. So now we are in a situation where you've ruled on a model that doesn't exist.

In class certification, you were required to evaluate the damages model under *Comcast v. Behrend*. You certified a class under a model that no longer

exists anymore, that is -- where damages are calculated differently.

THE COURT: How does the model no longer exist? It's the same thing.

MR. SANTACANA: It's really not.

THE COURT: He's now multiplying by month, something you contemplated might have been the case. So the figure has now gotten exponentially bigger. Okay. I understand that.

But I just don't see this -- this shift you -- you're saying has occurred here because it -- it doesn't appear that that's the case. I understand that you think it's smoke and mirrors, and you're going to be using every opportunity to attack it. And that's your right.

But this idea that if the best harm you can come up with is, "We have to take another deposition," well, maybe I'll give you the cost of the deposition. They may might have to pay for it. But that's not significant harm in the light -- in light of the nature of this case.

MR. SANTACANA: Well, there's a few things I would say about, you know, decisions that I think hold differently. So the -- the three Ninth Circuit decisions say that if you have to reopen discovery, that

is by definition "harm." Because what you've done is you've permitted a party to lie in wait or to change their mind after the fact.

And those three Ninth Circuit cases are *Hoffman*, *Ollier*, and *Wong*. They're opining on what does Rule 37 mean in the --

THE COURT: But how is -- how did they change it? They said the -- Mr. Lasinski said, "This is how I'm calculating this. And my conservative floor, subject to my getting more information, is $486 billion."

So now they -- now he's doing it on a per-month basis, and the figure has gone into the stratosphere. But how is that -- how -- how --

MR. SANTACANA: The analogy -- if -- if he had -- if he had -- he was measuring lost profits and his damages model had been, "I've measured the amount of revenue that you made on your infringing widget," and doesn't particularly count profit margin, and then the discovery ends. And then the -- after that, the expert comes back after being Dauberted -- there's a *Daubert*. There's -- he's criticized for it -- comes back and says, "Actually, let's take costs into account."

Or the expert says during expert discovery, "I disavowed reliance on a particular cost line in the

profit-and-loss statement. That one wouldn't be appropriate to deduct." And then before trial, and after everything is done, he comes back, and he says, "Actually, I think we should deduct it."

Those are actually examples that are very similar to the cases that we cited. Both -- in this district -- Judge Illston, Judge Tigar, Judge Davila -- have all done this in very similar circumstances, and that the Ninth Circuit was affirming in *Wong*, *Ollier* and *Hoffman*. And what they say is that Rule 26 requires you to disclose not just the category of damage, but it's computation. You have to say the amount you're going to ask the jury for. So if you allow -- if you're permitted to wait 600 days after discovery to start disclosing new numbers using new variables and new factors, which is what happens in the cases that we cited, cases like *NetFuel versus Cisco* that Judge Davila decided --

THE COURT: What are the new variables and new factors?

MR. SANTACANA: In this case?

THE COURT: Yeah.

MR. SANTACANA: So in this case, as I said, the equation was -- $3 was the amount the data was worth. And then the number of devices was the second

input. Those are multiplied for a number. And when -- when -- and the report said, and I expressly don't want to multiply it by months, even though Google's Screenwise program would multiply it by months. And then, in deposition, he said the same thing.

In response to the criticism at *Daubert* that he didn't multiply it by months, the plaintiffs didn't say, "Oh, he will later. Don't worry." They didn't say he's always intended to. They didn't say that's actually a hidden third variable in his equation. They said, "It's a feature, not a bug. It's a good thing that he didn't multiply it by months, because it makes it a conservative opinion."

So they are -- just like the expert who disavows a cost line item on a profit margin, they're disavowing something until 600 days after discovery is over, and then coming back and saying, "Actually, I've changed my mind. I don't disavow anymore. I embrace it." And that's very similar to some of the cases that we cited.

Another one is *Mass Probiotics*, where the -- after discovery, there were line items in the financials that they had said, "We're not going to rely on," and then they came back, and they started to rely on them. In every one of these cases that we cited, the Court did

not say, "Just take a depo and let -- make them pay for it." The Court said, "Scheduling orders mean something. Rule 37 is very harsh. It's an automatic sanction for a reason because you -- you have to disclose your computation before discovery closes, so that everybody knows what they're preparing, so that everybody has a chance to attack it, and so that when you attack it, the experts" -- so in *Benefit Cosmetics*, you held the expert, while he's sitting in a chair at deposition, cannot start offering surrebuttal opinion because it's not fair. They have to offer their opinion, and then they have to lock themselves into it.

And this isn't a case where the -- the record is silent about this particular issue with the opinion. This is a case where they've repeatedly disavowed any intention to rely on the number of months as an input into the calculation, and now they're relying on it. And of course, the reason is obvious, right? It does enhance the exposure, but it is also a -- not just a quantitative difference; it's a qualitative difference in how the equation is set up. It's an input they said they wouldn't use.

THE COURT: Okay. Let me hear from the plaintiffs.

MR. BOIES: May it please the Court?

THE COURT: Yes.

MR. BOIES: Let me begin by just clarifying what the record actually shows. Counsel told you that Mr. Lasinski did not give us an explanation that he didn't have the data. That is just not accurate, Your Honor.

The deposition is before the Court. But on page 57 of the deposition, and this is after the calculation of $3 per month is one that has been decided. After Mr. Lasinski had said that a conservative measure is $3 per device per month. And that was based on the so-called Ipsos study that Google did.

Now, counsel, same counsel that's arguing, in the brief:

"Question: The Ipso study paid $3 a month?

"Answer: In certain cases, yes.

"But your actual damages opinion pays $3 just once.

"Answer: That's -- that is correct.

"Question: Why?

"Answer: Because based on the information that I have, I am able to determine the number of devices that had sWAA off at at least a

given point in time. I am not able to determine the certainty that it has sWAA off and actually met with other requirements for the damages calculation, such as hidden third-party sites with Google trackers on them after the initial calculation."

Now, just to be certain that there's no misunderstanding about what he was saying, he was saying he didn't have at that point, the data to be able to determine how many months to multiply it by. Counsel, and this is at page 59, and this is counsel's question summarizing what has just happened.

"Question: Now I asked you why you assigned $3 per device rather than $3 per month. And you said because you were missing data on whether a particular device actually went to third-party sites."

That's at lines 5 and 9.

And then on page 61, again, a question:

THE COURTROOM DEPUTY: I know. I can't -- I'm sorry, Judge. The court reporter is trying to talk, but I can't hear her. So I don't think she can --

THE COURT: She's indicating she can't hear, unfortunately.

THE COURTROOM DEPUTY: Yeah.

Can you hear me?

THE COURT: As you all know, we have a court reporter shortage, so we're virtual. And this is the first time I've had any issue with it.

THE COURTROOM DEPUTY: Yeah. So you can't -- can we stop one minute?

THE COURT: Well, perhaps, if Mr. Boies move to that -- is that lecture working better?

THE COURTROOM DEPUTY: Let's see. Is the other lecturn -- okay. Let's try that.

MR. BOIES: Can you -- can you hear me now?

As they say in the commercials.

THE COURTROOM DEPUTY: Oh, step back a little bit, she said.

THE COURT: Step back a bit.

Okay. Try again. Try the: "Can you" --

MR. BOIES: Can you hear me now?

THE COURT: She can.

THE COURTROOM DEPUTY: She can, yeah. Okay.

MR. BOIES: To sort of summarize --

THE COURT: I -- I'm -- I'm with you. I have the transcript -- parts of the transcript, so I'm with you. Go ahead.

MR. BOIES: So I -- I'll now go to the page 61, line 17. This is the third time this question had been asked.

"Question: Why was it more appropriate to do a one-time calculation?

"Answer: Again, even if I had SWAA off months, that wouldn't necessarily tell me -- or not technically, if they hid a third-party site with Google tracking. And so in this case, as I've said in the past, appropriate and conservative, I calculated a one-time payment per device."

And then, it goes on. Page 63, lines 14 to 17, says the same thing.

THE COURT: So my question to you is: What -- what changed for him between the time of the supplemental -- or between the time of his initial report and then his decision to adopt to the per-month approach and come up with the figure that he came up with. What -- what's new? Why -- why did he do it?

MR. BOIES: I -- I think two things, Your Honor. And -- and to answer fully, I need to go back a little bit into -- into time.

At the very beginning of this case, we asked for documents and data that would show the actual number of months that class members used devices with WAA turned off and hit third-party sites. And we asked that -- who will preserve all that data. Judge Tse

denied our request on the grounds it was too voluminous and said that what we should do is we should have a statistical sampling.

We then asked Google to provide a statistical sampling. And they said -- this was before class certification -- and they said it is premature to do that until we have class certification. There's a dispute as to whether they agreed to do it or not after class was certified, but there's no dispute that they objected to doing it at that time, providing the sample data. And they said it was premature to do it until class had been certified. Of course, class wasn't certified until after discovery closed and after class was certified and the motion to clarify was decided. Again, asked them for the sample data.

And then we had the Case Management Conference on October 10th. Preceding that, we had a case management statement. And in that statement, we said we want the sample data. And they said, you don't need the sample data because the jury can infer from all the data that you already have, how many months are at issue.

And what we did in the so-called new opinion, which is not a new opinion at all. There's no opinion that's there. All the expert at saying is, "I'm going to provide illustrative calculations so that the jury

knows the arithmetic that occurs if they find a certain number of months." And Google was saying explicitly in the case management statement that they put in, they were saying -- let me see if I can find it.

They say -- and this is on page 13 of the case management statement at line 21. Importantly, plaintiffs admit that there are satisfactory alternatives to this data, that is, the sampling data that we're asking for, that could achieve the same purpose, i.e., plaintiffs can ask the jury to draw certain inferences using the information Google did produce. That's in quotes. Plaintiffs cannot argue prejudice. They have not argued, and cannot argue, that they cannot make their intended arguments before the jury at trial without the data that they belated the request.

Now, they knew exactly what our intended arguments for trial were at this point. Because this is after our third amended disclosure. So they know exactly what we are going to be asking the jury to find, which is to take the number of months that the jury finds that this data was actually used multiplied by the number of devices multiplied by $3.

THE COURT: Well, under that theory, and I just want to understand your position, do you think the

initial report by Mr. Lasinski would permit you to make the -- the demand for the calculation that you now make? In other words, are you saying because he said how he did it, and he said this is a conservative floor and the rest, that therefore, he didn't even need a supplemental report? Is that what you're arguing?

MR. BOIES: Absolutely, Your Honor. And not only is that our argument, that is what Google agreed to up until their child brief in this -- in this motion.

THE COURT: But the -- the -- from their perspective, therefore, the 486 million doesn't really give them much of a sense of what you're going to be claiming. Because Mr. Lasinski disclaims that he's going to use a per month multipli- -- dollars per month. He's going to do it on a one-time basis, and they're left with, all right, that's how he's calculated it with the usual caveats and maybe new information and the like. Then we don't have any new information. And then he's -- he's come up with a 50 billion, or whatever the figure is. So they really weren't on notice that that's what you were going to do.

MR. BOIES: I -- I -- I think, Your Honor, they were certainly on notice of the following things -- and he didn't disclaim. He didn't disavow. What he said -- and I read it four times --

THE COURT: Yeah. No. I have it in front of me.

MR. BOIES: What he said was, "I don't have the information. I don't have the data for me to make that -- for me to render an opinion as to how many months."

And as Your Honor will see at -- at trial, Mr. Lasinski is a very conservative expert. And you know, his view was, "I can't tell you exactly because I don't have the data." Our argument was, we're going to ask a jury to make that inference from the evidence that we can present to the jury, and that you can then take the model -- Mr. Lasinski's model of $3 per device per month, and -- and then -- and the jury can then conclude what the right damages amount is.

Now, it is true that in Mr. Lasinski's expert report, he did not calculate each of the numbers that could come up. It did provide a model, and that model hasn't changed. The -- he's said repeatedly in his -- in his expert report and in his deposition that the right number is $3 per device per month. He says, I can tell you the $3. I can tell you the number of devices. But I can't tell you the number of months because I don't have that information.

Now, what we were asking for in October --

actually, we asked for it in September, and then the hearing was in October -- was to provide the sampling data that would permit him to actually take that sampling data and come up with a number. They said, You don't need the sampling data because you can just ask the jury to infer the number of months."

Now, in their initial briefing in this is very motion, Your Honor, in their initial briefing, they say -- and this is on page 11, at lines 17 to 20. They say:

> "Plaintiff's new opinion -- that's what they're referring to when they talk about the additional expert disclosure -- is not necessary to support their actual damages opinions. Plaintiff's own disclosures admit that there are alternatives for the jury. Plaintiff's own disclosures admit that there are alternatives for the jury to reach the actual damages figure without the addition of the new opinion proposed in their third amended Rule 26 disclosures."

And they then cite, Exhibit 1, at pages 14 to 15 of their brief. Exhibit 1 at pages 14 and 15 of their brief, which they are citing and which they are saying we can take to the jury as our damage model is

word for word what we're asking to do -- it is word for word what is in our third amended disclosure.

The only question is whether -- now, in their reply brief, they say, "No. We want to take this back. And you can't even ask a jury to make inferences." But assuming that they don't get to take this back, the only issue here is whether the expert gets to make illustrative calculations based on what the jury is going to find the right number of months are. The expert has provided the formula -- from the very beginning, the same formula, $3 times device times months.

All we're going to do is ask the jury to fill in that -- months. And all we would like to do is have our expert provide arithmetic calculations. Now, we could probably do it with somebody else on the stand, even one of the plaintiffs, with a calculator or something. But all we were asking to do with the expert is have the expert make that illustrative calculation.

And they got out of reducing the sample data back in October because they said we could take this to the jury. If -- if they're now going to argue we can't take it to the jury, we're going to ask the court to give us that sample data, so we can actually have the -- the expert make the calculations on the sample data.

But up until their reply brief, there was agreement that we could ask the jury to make these findings based on the model. We have information in the record from which we can ask the jury to do that. And any question with whether we could have the expert do illustrative arithmetic calculations.

THE COURT: I understand. Thank you.

MR. BOIES: Thank you.

Oh, just one more --

THE COURT: Sure. Go ahead.

MR. BOIES: Mr. Lee reminds me of something that I knew I was going to forget, and that is -- and it's a minor point -- but in his expert report, he says this was up through 2022. And now if -- we certainly would have some number -- number of months after 2022. So, I mean --

THE COURT: I understand.

MR. BOIES: They knew it was not going to be just one time.

THE COURT: Because they didn't have the certified -- the -- the --

MR. BOIES: Yeah.

THE COURT: -- the class cert period?

MR. BOIES: Yeah.

THE COURT: Yeah.

MR. BOIES: Thank you.

MR. SANTACANA: Thank you, Your Honor. I want to start where Mr. Boies started, which is the testimony that Mr. Lasinski gave because he stopped reading right where our argument begins. So sure, of course, Mr. Lasinski, like almost every expert I've ever deposed, claims that some of the flaws in his opinion come from the fact that the defendant hasn't produced something he'd love to see. This is par for the course in an expert deposition.

And so I pressed him on it to find out what difference it would make if he had this supposed data he said he did not have. And that is when I said to him -- and I read this at the beginning, but I want to note it's on page 61 right after where Mr. Boies was reading from. That's where I asked him:

"Well, hold on a minute. You are aware that Google has the records of when users had WAA on and off?

"Yes.

"And for how long?

"Yes.

"So you could, for example, calculate the number of sWAA off months for each user.

"And he says: I did do that."

The number was in his report, Your Honor. The number they now use for this new report was in there already. And so I said: "You did do that. So why didn't you pay them per month?"

And he says -- he doesn't say, "I didn't pay them for months because there's some other piece of information that I am missing." He says -- when he's cornered and when he's shown that he has the data already, "I thought it was more appropriate and conservative to do a one-time calculation."

And I said, "Why was it more appropriate to do a one-time calculation?"

And this is where he says, "Even if I had sWAA off months, even if I had it, that wouldn't necessarily tell me whether or not they had a third-party site."

Now --

THE COURT: Can you address what Mr. Boies pointed me to in terms of the -- his argument on the case management submissions and the suggestion that, according to him, you made that, you know, they can operate by influence and come up with the calculation that they've come up with.

MR. BOIES: No, you're not. This is -- I mean, there are -- every time we come before you, there is a sort of litany of, "Well, the other side said this

and that, and Google said this and that, and that's why I didn't live up to my obligations in discovery." We've been here before .

The case management statement, the statement that he read to you, if you go back and look at it in context, was a statement about their desire to argue about how offensive the data collection is. And they were saying, "We want sample data." And we said, "You have sample data."

And I really want to stress this. They keep saying we got away with something by not producing sample data. Judge Tse said, "You could sample data, or you could provide the named plaintiff's data." We provided the named plaintiffs data. We also provided sample data from their experts. They created fake accounts. They used apps that had Google Analytics, and we produced all of that, and we did it all during discovery. So we had sample data from which they could make all of these arguments and inferences the whole time, and they never moved to compel some third bucket of sample data. So it's not in the case. They didn't have to compel it.

But when we said in a case management statement was the jury can infer how offensive the data is by looking at the evidence that's in the record.

That's what we were saying. We were never saying -- and -- and I think it's kind of -- it's -- it's not believable to suggest that what Google said in a case management statement was it would be fine with us if the jury, without any opinion in the record and any record evidence, inferred that the damages was 60 times as high as the number of the plaintiffs had put forward.

Likewise, our Notice of Motion says the plaintiffs shouldn't be permitted to press a damages calculation that they never disclosed, which is just a baseline rule under Rule 26. That's what our motion says. So to say that there's a paragraph in our motion that somehow says, unless the -- I mean, you can say it to the jury in closing for the very first time with no prior disclosure. Obviously, we're not agreeing to that. And to the extent there's any reading of what we wrote to that effect, obviously, it's not what we intended.

THE COURT: I -- I still don't get, though, fundamentally, how you can say that the initial Lasinski report capped them at 486 billion.

MR. SANTACANA: Well, actually, it didn't.

THE COURT: I don't see how you come up with that.

MR. SANTACANA: Well, I want to be clear. It

didn't actually cap them. It had a fixed variable of $3 and a variable -- dynamic variable of number of devices. And in fact, after discovery, we produced the figures of number of devices for '23 and '24. And his number's gone up to 523 million. So it's not capped. It's a calculation. And it has one dynamic variable in it. And that variable changes over time. And we have -- we're not moving to strike that.

His supplemental report has three sections --

THE COURT: The only variable that has changed, even with their calculation, is per month.

MR. SANTACANA: There -- there -- it's the addition of a new variable, which is per month.

THE COURT: It's not a new variable. The variable is $3 and they're now applying it on a per-month basis.

MR. SANTACANA: Right. So the number of months would be a third variable in this equation.

THE COURT: It's sort of a semantic discussion, but yeah, okay.

MR. SANTACANA: Well, it's a new -- I don't -- it's a new method of --

THE COURT: It's not a new method. It's not a new method. It --

MR. SANTACANA: Your Honor --

THE COURT: Wait a minute.

At best, it is -- they led you to believe that they felt a one-time $3 multiplier was the appropriate way to go. And according to you, you were hoodwinked into thinking that they would never then take the position that they're going to do it -- do it on a monthly basis. But it's not some new come-from-left-field variable. You have discussions about should it be done per month or not?

And -- and I'm not saying your --

MR. SANTACANA: They can disavow that.

THE COURT: -- argument is wrong. I'm just saying that to -- to -- to use this $3 per month concept as something that is this wild thing that you had no idea that this could happen -- I understand that from your perspective, the frustration of saying you thought he was locked in, that he wasn't going to do that. I understand your reading of that. But to -- to say this is a methodology or a variable that you've never seen before is taking it too far.

MR. SANTACANA: I'm not saying that we've never seen it before. I'm saying that we -- that he closed himself off from using it in recalculation.

THE COURT: I understand. I understand.

MR. SANTACANA: Right? If I had said why

don't you multiply it by the number of red cars in San Francisco, and he said, no, that wouldn't be appropriate, and then later, he added that variable to be the same --

THE COURT: But then we're -- then we're parsing the words of this -- you know, these fine lawyers and skilled expert on whether or not he left the door open or he didn't leave the door open. And --

MR. SANTACANA: I'd like to --

THE COURT: Each side then reads the back and the floor a little bit differently. But nobody is -- is shocked that we have a -- a -- a $3 per month issue before us, I don't think.

MR. SANTACANA: Well, the -- the question -- "shock" is the right word. The question is, What is the -- was Google surprised, and to what degree, to see this calculation? And I want to read to you from the end of their opposition --

THE COURT: Is surprise the concept, or is it whether or not you were --

MR. SANTACANA: Your Honor, we were deeply surprised. And actually, the plaintiffs --

THE COURT: Well, I -- I am willing to say you were the most surprised you've ever been. Is that -- is that the -- is surprise the metric I'm to apply here?

MR. SANTACANA: It's one of the four --

THE COURT: Okay.

MR. SANTACANA: -- factors under Rule 37.

So when they opposed the *Daubert*, and we said it's really inexplicable that he doesn't multiply by month, which shows that he's not reliable, this is what they said -- they're joking in their brief in their opposition to the *Daubert*. They say, "What Google is really saying with a straight face is that Mr. Lasinski's damages opinion should be stricken because the actual damages he prescribes are not high enough. If Google honestly believes a $3 payment is inadequate -- this is them writing it -- that problem is easily solved. Plaintiffs welcome a stipulation that Mr. Lasinski's estimated payment should apply on a per-month basis."

They knew at *Daubert* that we did not think that was in the case, that it was off the table, that it was not part of Lasinski's opinion. They knew that. They were joking about it. They were sticking it in our face. So to come back after mediation fails and say for the first time, "You still haven't stipulated to it, but I'm going to do it anyway," for Your Honor to bless that is to say that they can always add or multiply their damages figures as long as there's some number in the

record to hang their hat on.

And I think the only other thing I want to read to you, Your Honor, and I'm not trying to read you a bunch of passages. But the *Wong* case says, and this is repeated in every case --

THE COURT: Which case is this?

MR. SANTACANA: *Wong* is a Ninth Circuit case.

THE COURT: Okay.

MR. SANTACANA: They're affirming an exclusion under Rule 37 and they are elaborating on the standard of substantial justification or harmlessness. And under harmlessness, the disclosing -- the late disclosing party said it's not harmful because it can be cured; there's enough time before trial. And the Ninth Circuit says, "Disruption to the schedule of the court and other parties in that manner is not harmless. It's not harmless as a matter of law. Courts set such schedules to permit the court and the parties to deal with cases in a thorough and orderly moment. And they must be allowed to enforce them."

And there's a number of --

THE COURT: As I sort of alluded to you before, I -- I'm glad you've presented these authorities for me so I can review them, and they're persuasive and helpful in the appropriate circumstance. But the

takeaway to me is not that the Ninth Circuit has said, "This is what you must do." The Ninth Circuit is being asked whether or not with the particular facts before the District Judge, did District Judge abused his or her discretion? That's what the Ninth Circuit is being asked.

MR. SANTACANA: Yeah. And then --

THE COURT: So it can only be -- go so far. It doesn't support the proposition that had the district judges gone the other way in some of these cases, that necessarily would have resulted in a reversal by the Ninth Circuit.

MR. SANTACANA: I fully understand -- I fully understand your point. The only point I'm trying to make is that the ability to cure and -- by reopening discovery has repeatedly been held by the Ninth Circuit to not be evidence of harmlessness.

THE COURT: In the particular case the Ninth Circuit was reviewing.

MR. SANTACANA: Correct.

THE COURT: I don't know if it's a --

MR. SANTACANA: If you want a comparable district case --

THE COURT: No. But are you saying to me that the Ninth Circuit is saying, "If you open -- if you have

to reopen discovery, we're telling you, District Courts, that is harmful and you should -- you should rule in a particular way on the question like we have before us." I don't think that's --

MR. SANTACANA: No. I don't think that's --

THE COURT: -- is saying.

MR. SANTACANA: -- true. I don't think that's true. I just think they're elaborating on what harmlessness means in Rule 37.

THE COURT: Okay. Fair enough. Fair enough.

MR. SANTACANA: So I'll give you an example of a district court case, which is affirmed in an unreported Ninth Circuit decision. It's the *Luke versus Family Care -- Care* case. It's very similar to this case.

"The expert says the symptoms of a particular disease would not show up on a liver function test for two to four weeks. Then later, it turns out, at summary judgment, that that's kind of a problem for this expert. So after summary judgment, the expert says actually the symptoms would show up in 10 days."

So he goes from two to four weeks to 10 days, right? It's actually not even adding a variable. He's just -- and all the evidence was there in the record. And even still, the district judge -- this is a Western

District of Washington case -- and the Ninth Circuit say, you -- you can't -- even if it looks like a small change --

THE COURT: Well, that doesn't seem to be a small change to me. That seems to me quite a substantial change.

MR. SANTACANA: Well, it's depending on your perspective. 29 and a half billion dollars, Your Honor. I mean, they brought, I think, 13 lawyers here for a reason.

THE COURT: No, no. But -- but if they're saying -- what? You're saying this case, it's a big -- big difference. You're right. It definitely is. What I'm saying is -- I'll have to go look at that case. But if the expert's opinion on -- what? -- a diagnosis that it's going to show up in a certain period of time, and no, it -- it -- I'm changing my view. It shows up --

MR. SANTACANA: Right.

THE COURT: That's a bit different than this case, where the expert says, "I'm only going to apply the $3 on one month," and then he says, "I'm going to apply it on more to" -- and therefore, the damage amount gets changed. I don't think those are analogous. But I'll go and look at your --

MR. SANTACANA: Yeah. I mean --

THE COURT: If you're suggesting that stands for the proposition that the expert is making a very small change, I'd have to look at that, because that doesn't sound like a small change to me.

MR. SANTACANA: No. What -- what I meant by small change was that he changed the number of 14 days to 10 days, which sounds small, but is significant in the context of that case, just like it is here. So for example, if we had known that Mr. Lasinski --

THE COURT: He's not changing the $3 per month. He's just -- he didn't apply it -- he applied it on a one-time basis, and now he's applying it on a per-month basis. He's not changing anything. He's just multiplying it out on a per-month basis.

In your case, he said this -- the -- the -- the condition would manifest in a different period of time. That's -- that's a pretty different change, don't you think?

MR. SANTACANA: I see them as similar.

Another case is Judge Illston's *Bastidas* case, where it was a -- it was a damaged opinion, if that is more analogous.

THE COURT: Well, I think a damages opinion is a better group of opinions for us to look at than --

MR. SANTACANA: Sure.

THE COURT: -- than an opinion where --

MR. SANTACANA: Well --

THE COURT: -- for example, a medical diagnosis is altered in some fashion.

MR. SANTACANA: I -- I see what you're saying. Well, so *Bastidas* is a damages case. And in that case, all of the numbers had been disclosed in the -- in the report, but the expert had disclaimed a particular way of combining them, and then later, does combine them. And Judge Illston said, "You can't do that."

And in *Mass Probiotics*, the same thing. There was a specific calculation of actual damages, just like here of $350,000. And then later the calculation became, after discovery, 12 million based on -- it was on the last day of discovery, I believe, so still plenty of time to cure before trial -- but -- but decided to calculate it differently.

And so here, you said a number of times it hasn't changed. Maybe a way we can say it is he decided to calculate it differently than what he disavowed before and what his lawyers -- or what plaintiff's lawyers had disavowed before.

And the reason I know that -- and that you should know that the surprise is significant to Google from a litigation tactics perspective, is because we

pointed this out in the *Daubert*. And all the plaintiffs had to do if this intention that they say was always there had been there, would have been to write in their opposition brief, "What do you mean? It's one month today, but it might be three months later. It might be 300 months."

THE COURT: Well, I'll tell you --

MR. SANTACANA: Well, what they end up saying is 3 billion months.

THE COURT: I'll tell you, and I suspect you're agree with me when I say this. I think your strongest argument is that we didn't get any new information and it changed. That's your strongest argument to me.

And I'm still unclear why their -- why the -- the decision to go per month -- I know that the class cert occurred. There's a class cert period. That's part of the answer I heard from Mr. Boyce. But I --

MR. SANTACANA: Well, they say in their brief why, actually. In their opposition brief, they adopt a specific view of what happened. And they say that the reason that they decided they needed to disclose this was because of something that happened out of mediation. They don't say because they got data they didn't have before or a ruling that they do not expect or have

before. They say that it was because -- they -- I think the way they phrased it was they learned for the first time that we might have a different view.

THE COURT: Yeah. And we don't -- obviously, I can't get into --

MR. SANTACANA: Of course. But my point is, like, they must have -- of course, they knew our view. We filed several motions about it. So it's not a credible explanation for why you would suddenly disclose it.

THE COURT: Okay. Any final comment?

MR. BOIES: I'll be very brief, Your Honor.

THE COURT: And yeah, you need this apparently.

MR. BOIES: First, answer the Court's question. There was no change in the model. It was always $3 per device per month. He always said that was the right way to do it. He said repeatedly, I don't have the data to fill that in.

And when we got to last October, we asked for the sampling data. And -- and they said in response, "You don't need the sampling data to make your damages calculation to the jury because you've got enough already." And once we had that, we were, "Okay. We can now go to the jury with our arguments."

And when they say, that this -- page 11 of -- of their first brief -- this is their brief. Page 11. The -- I don't know if the Court has that up there.

THE COURT: Go ahead.

MR. BOIES: Line 17 through 20. And counsel suggested to the Court that when they said we could go to the jury, that didn't have anything to do with damages. Just look at what they said, Your Honor.

"Plaintiff's new opinion is not necessarily to support their actual damages opinion. Plaintiff's own disclosures admit there are alternatives for the jury to reach the actual damages figure without the addition of the new opinion proposed in the third amended Rule 26 disclosures." And they cite Exhibit 1 at 14 to 15. If you look at that -- if you look at those pages, 14 to 15. That's exactly what they're now in their reply brief in the argument, trying to strike and trying to prevent us from going to the jury on.

All we're asking here is what we've always wanted to do was take this model and apply it to the number of months when we have an ability to calculate those months. And we said, instead of the -- in his deposition, we've said repeatedly when we get those number of months, we can do it. We asked for the sampling data. They said, "You don't need a sampling

data. You've already got enough to go to the jury." We said, okay.

THE COURT: All right. I suspect whatever I do, then it will prompt some flurry of following. So we'll deal with it when it comes. I don't want to -- in other words, I don't want to -- I don't want to talk through the scenarios of, "Well, if we -- if I go with the defense -- defendants, then how does that impact trial date. Or if I go with the plaintiffs, or what have you" -- we'll -- we'll leave that for another day. Because I need to make the first decision of -- on this particular motion. But it may then require some scheduling conferences and the like. So we'll deal with that later on.

Okay. Thank you. You know, Judge Tse knows a lot about this case, and consenting to Judge Tse for all purposes would be a -- really a thing that you should all think about. So okay. Thank you very much. Very helpful.

(Proceeding concludes at 4:25 p.m.)

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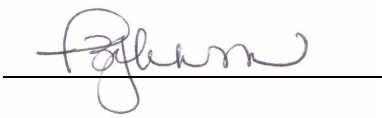
C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



02/14/2025

Teresa B. Johnson, CVR-M-CM, RVR, RVR-M — Date

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